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Dear Euan

Scottish Crown Estate Bill at Stage 1

Thank you for your letter of 20 February setting out the questions raised by the Delegated Powers and Law Reform Committee during their consideration of the delegated powers contained in the Scottish Crown Estate Bill. I have addressed each point in turn below.

Section 3 – Transfer of management function

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative if textually amending primary legislation, otherwise negative

1. The Delegated Powers Memorandum (DPM) explains that “the policy is not to take decisions on who will manage assets, but to provide a mechanism by which decisions can be taken on who would be the most appropriate manager, on a case by case basis”.

Please explain why the Scottish Government has considered that it is not appropriate to specify on the face of the Bill at least the proposed managers of those assets which are of national economic and environmental significance (including the rights of ownership in, and to exploit, the seabed and foreshore), possibly supplemented by a power to amend who the managers would be in future?

In considering changes to the future management of individual assets, the Scottish Ministers have not classified the assets into particular categories such as those which are of national economic or environmental significance, or those which are of less significance. Indeed the economic or environmental significance of an asset may change over time. The approach taken by the Scottish Ministers has been that the most appropriate process is to enable decisions in respect of the future management of

particular assets to be taken on a case by case basis. That would of course take into account the particular economic or environmental significance of that asset at that time. This approach is to ensure that the best decision is taken at the time of a change in management, and to also take into account that there may be further changes in the future.

Also, part of the decision making process will be that a prospective manager is capable and suitable to take on the powers and duties of a manager under the Bill. Those powers and duties may be amended during the Parliamentary passage of the Bill and if that occurs then a prospective manager deemed capable and suitable under the present Bill may not be considered such under an amended Bill. For that reason the Scottish Ministers do not consider it is appropriate to determine future managers at this stage.

It is also not sufficiently clear at this stage which are the assets that communities have an aspiration to manage locally in different parts of Scotland. It was not considered necessary or practical, therefore, to provide a list of proposed managers. The effect of the model provided for in the Bill is that Crown Estate Scotland (Interim Management) will continue to manage each asset until the Bill mechanisms are exercised to effect a change in management of a particular asset.

2. Given the obvious significance of some of the assets within the Scottish Crown Estate:

(a) please explain why it has been considered that in respect of all the assets the power to make regulations in section 3 should be subject to scrutiny by the Parliament by the negative rather than the affirmative procedure (unless the regulations modify an enactment)?

The Smith Commission on further powers for the Scottish Parliament recommended that, following the transfer of responsibility for the management of the Crown Estate's economic assets in Scotland, responsibility for the management of these assets will be further devolved to local authority areas such as the Islands or other areas who seek such responsibilities. Where any regulations under section 3 would amend primary legislation it was considered appropriate for these regulations to be subject to the scrutiny by the Parliament by the affirmative procedure. The Scottish Ministers think that otherwise it is appropriate for regulations under section 3 to be subject to the negative procedure. Furthermore, given that there may also be a substantial number of regulations for different assets in different parts of Scotland we do not consider it a good use of valuable parliamentary time to scrutinise under affirmative procedure transfers unless primary legislation is to be amended.

A further reason why the negative procedure is considered appropriate is because the national interest would be protected by the provisions in the Bill as the management of these assets would be governed both by the national framework in this Bill and by the 2017 Transfer Scheme. The Bill sets out the duties which all managers have to abide by and includes a range of planning and reporting procedures that help ensure that there is adequate scrutiny of a transferee's exercise of the management function.

(b) Has the Scottish Government considered whether the regulations in respect of those assets which are of national economic or environmental significance should be subject to scrutiny and approval by the Parliament by the affirmative procedure, whereas the regulations in respect of the commercial and rural estate assets of lesser value could be subject to scrutiny by the negative procedure?

We have not made the assumption that the commercial or rural estate assets are of lesser value than other assets. The Scottish Ministers do not consider that it would be appropriate in practical terms for a value threshold to determine which procedure would apply in relation to an asset. This is because the relative value of an asset would depend on several factors such as commercial potential for revenue generation, capital value, intrinsic or strategic national importance, environmental sensitive or uniqueness. We considered that a standard approach for the transfer or delegation was more practical. Furthermore, given that there may also be a substantial number of regulations for different assets in different parts of Scotland we do not consider it a good use of valuable parliamentary time to scrutinise under affirmative procedure transfers unless primary legislation is to be amended. In addition, given the controls contained in the Bill to protect the national interest it was considered appropriate to only require an affirmative procedure where primary legislation is being amended. The transferee under Regulations made under section 3 will be subject to the legal duties contained in the Bill, which are designed to protect the national interest. We consider that scrutiny by the negative procedure is appropriate.

3. Section 3(1) allows the regulations to make provision “for or in connection with” the transfer of the management functions as further set out in the subsection. The ancillary powers in section 41 would also allow supplementary provisions by regulations, for the purposes of the Act and the regulations under section 3.

(a) Please explain how it is envisaged that the power to make provision “in connection with” the transfer of management functions could be exercised?

As well as provision effecting the transfer of the management function itself, the Scottish Ministers consider it that it will likely be necessary (depending on the circumstances of particular instances in which the function of management is transferred) to make provision for connected purposes. As an indication of the type of provision that it might be necessary to be made the Scottish Ministers directs the Committee to the provisions of the Crown Estate Transfer Scheme 2017 (‘the Scheme’).

It is possible that a transfer will involve some of the assets managed by the existing manager but not all of the assets. For audit and accounting purposes it may be desirable to make provision requiring a statement of account to be made in respect of those assets the function of which is being transferred, and for that to be audited. That would aid both the former manager and the transferee in discharging their responsibility for accounting for the assets which each person manages following the transfer. Such provision was made in respect of the transfer of functions from the Crown Estate Commissioners to Crown Estate Scotland (Interim Management) (‘CES(IM)’) by paragraph 9 of the Scheme.

Other provision that it might be desirable to make in certain circumstances is provision equivalent to paragraphs 10 to 13 of the Scheme, which concerned the treatment and apportionment of receipts in relation to the assets between the Commissioners and CES(IM). Those provisions also dealt with sums paid in error by a third party to the former manager when such sum was due to be paid to the new manager and vice versa.

(b) Why is it appropriate both to confer that power, and the power to make provision supplemental to it? How is it envisaged that this supplemental power could be exercised?

Section 41 allows the Scottish Ministers to make ancillary provision for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Such provision is common in Acts of the Scottish Parliament and was considered appropriate and necessary to ensure that any unexpected issues which arise and which require further changes when implementing the Bill can be dealt with effectively – that includes when exercising the power in section 3. The process of transferring the function of managing assets of the Scottish Crown Estate is (depending on the circumstances and the asset in question) potentially complex. It may be that issues emerge following the making of regulations under section 3 that would require stand-alone provision under section 41 to be made, particularly if it relates to rights and liabilities of managers in relation to an asset under their management or to the relationship between the previous manager, the new manager and third parties. Further, if provision is made under section 41 which is supplemental to the provisions of the eventual Act it may be the case that for that to be effective it would also be necessary to make supplemental provision in relation to Regulations already made under section 3.

Section 4 – Directions requiring delegation of management function

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

4. Section 4(1) enables the Scottish Ministers to direct the manager of an asset to delegate the management function to ‘another person’ as mentioned in subsection (3). This includes delegation to “another Scottish public authority”.

(a) Is it intended that ‘another Scottish public authority’ in section 4(3)(b) includes the Scottish Ministers themselves, or not? Accordingly is the meaning of that paragraph (b) sufficiently clear, given that “Scottish public authority” is not defined in the Bill?

(b) Is it intended that “Scottish public authority” wherever used in the Bill has the meaning specified in section 126(1) of the Scotland Act 1998?

The intention is that the Scottish Ministers are not to be able to direct a manager of an asset to delegate the management function to the Scottish Ministers. It is not intended that the Scottish Ministers are capable of being a delegate under the Bill.

The Scottish Ministers confirm that it is intended that the expression ‘Scottish public authority’ has the meaning specified in section 126(1) of the Scotland Act 1998 (‘the 1998 Act’). Section 25 of the Interpretation and Legislative Reform (Scotland) Act 2010 (‘the 2010 Act’) provides that in an Act of the Scottish Parliament, the words and expressions listed in schedule 1 of the 2010 Act are to be construed according to that schedule. Schedule 1 of the 2010 Act provides that the expression ‘Scottish public authority’ has the meaning given to it by section 126(1) of the 1998 Act.

The Scottish Ministers will further consider whether section 4(3) is sufficiently clear and delivers the policy intention.

5. Some of the assets within the Scottish Crown Estate have obvious national significance. A direction under section 4(1) would have legislative effects, to delegate to a person the function of managing an asset. The delegate may have all the powers and duties of the manager, in terms of section 5(7).

(a) Has the Scottish Government considered whether it may be appropriate that a direction under section 4(1) could be subject to a form of parliamentary procedure, to provide scrutiny of the exercise of the power, and if so what form of procedure could be suitable?

(b) In that respect, has the Scottish Government considered whether it could be appropriate that directions in respect of those assets which are of national economic or environmental significance could be subject to scrutiny and approval by the Parliament by means of the affirmative procedure, whereas directions in respect of the commercial and rural estate assets of lesser value could be subject to lesser procedure (such as a requirement only to lay the directions before Parliament)?

(c) If it is considered that the directions could be subject to parliamentary procedure, why is the form of instrument properly directions, rather than regulations?

(d) Otherwise, please fully explain why it is considered that directions under section 4(1) should not be subject to any form of parliamentary procedure, nor requirements to report to the Parliament on the use of the direction-making power?

The Scottish Ministers have considered whether a direction given under section 4(1) should be subject to a form of Parliamentary procedure, but on balance do not think that would be necessary in the circumstances. The direction is an instruction as to how the management function should be exercised (i.e. via a delegate), and is, in the view of the Scottish Ministers of more administrative character than legislative.

A direction under section 4(1) is addressed to a particular manager of a particular Scottish Crown Estate asset, and is an instruction to that manager. It does not have general legislative effect, does not create obligations for any person other than the manager and does not itself result in a delegation occurring. Indeed, it may be that following the giving of a direction to a manager a delegation ultimately does not occur – a situation for which section 4(5)(b) specifically provides.

The direction is an instruction to a manager to enter into a delegation agreement with a proposed delegate. It is the delegation agreement, and the terms and conditions of that agreement, that give effect the delegation and which is the legal basis for the delegation, rather than the direction being the legal basis. The delegation agreement is of a contractual nature and governs the relationship between the manager and the delegate. The basis for the delegate being treated as the manager is section 5(7) of the Bill. Such treatment is expressly subject to the terms of the delegation agreement.

This is different to a transfer of functions under section 3 in that regulations made under section 3 are the legal basis for a transfer, and rather than being treated as the manager the transferee becomes the manager as a result of the provisions of regulations made under section 3. Under a transfer, the function is taken from the existing manager and

given to the transferee, meaning there is not the same continuing relationship as there is between manager and delegate.

A delegation agreement must also contain provision as to the period of the delegation, meaning there must be an end-point or a method of determining an end-point (see section 5(4)). It is also possible that an agreement will contain further provision as to the circumstances in which the agreement may, or is to, be terminated. Thus the delegation agreement and the parties determine the continuance of a delegation whereas under a transfer, a further exercise of the power conferred by section 3 would be required to transfer the management function again.

While there is no Parliamentary procedure in respect of directions under section 4(1), there are publication requirements under section 4(6).

6. Section 4(6) and (7) require the Scottish Ministers to publish a notice of a direction, which must set out the matters stated in subsection (7).

Why does this not extend to publishing the whole direction, including the terms and conditions of the required delegation of the management function?

The details listed in section 4(7) are the minimum of what must be published by the Scottish Ministers. It is open to the Scottish Ministers to publish the entire direction. The information required in section 4(7) is likely to be the information that is of wider public interest and it is possible that no further information will be included in the direction. However in certain circumstances it is possible that a term or condition specified in the direction is of a commercially sensitive nature and could contain commercially confidential information. Section 4(6) and (7) provide the flexibility to publish the whole direction but also to take into account that some details may not be appropriate for publication.

Section 6(1)(b) – Meaning of “community organisation”

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

7. In relation to the power in section 6(1)(b), the DPM explains that this power “enables a degree of flexibility to enable a body to be eligible to become a manager where it is appropriate”.

(a) How is it envisaged that this power could be used? Which bodies relating to a community might be designated as a “community organisation”?

Section 6(1)(a) and (2) set out the criteria which the Scottish Ministers consider a body should meet in the usual course of events in order to be a manager of a Scottish Crown Estate asset. However, at the same time the Scottish Ministers recognise that in certain circumstances a body may not meet all the criteria but that there are still good reasons for that body to manage an asset. For instance, it is possible that there are organisations in remote and sparsely populated locations which represent or are made up of a community, and which do not have 20 members. For example, some islands have populations less than that, and so would be excluded from taking over the management of an asset. The power to designate could overcome that.

(b) Could the power be more narrowly drawn, in respect that it enables *any* body (or class of body) to be designated in regulations as a “community organisation”, without any criteria being specified in the section as to how a body may relate to a community, before it can be designated?

We are satisfied with the extent of the power and that there are no criteria specified as to how a body which is designated under section 6(1)(b) may relate to a community. The power is couched in the same terms as equivalent powers in the Community Empowerment (Scotland) Act 2015 and the Land Reform (Scotland) Act 2003. The power reflects the diversity of the Scottish Crown Estate portfolio of assets, ranging from the seabed out to the 200 nautical mile limit, to salmon fishing rights in an inland stretch of river. The ‘community’ for the fishing rights could be, for example, those living on the banks of the river, or those who obtain some of their livelihood from the exercise of fishing rights – the local fishing tackle shop, the hotel where the salmon fishers stay – or the angling club which currently leases the fishing rights from Crown Estate Scotland, to name but three. Given that most, if not all, assets could be sub-divided for the purpose of management, to try to specify what counts as a community for each and every one would be impractical to cover exhaustively in legislation.

Section 35 – Power of Ministerial direction

Power conferred on: the Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

8. The Committee seeks an explanation of the following in relation to the powers of Ministerial direction in sections 13 and 35:

The use of the power in section 13(1) will in effect regulate the amounts that managers may charge by way of rent for the lease of the assets, or in connection with any other agreement for the use of the assets. Please explain why directions are the appropriate form of instrument for the use of this power, rather than regulations made by Scottish statutory instrument?

Current aquaculture rents are set by Crown Estate Scotland (Interim Management) by a formula, which is published on the Crown Estate Scotland website. A formula based approach is also used to set lease charges for other activities. None of these rates are set by regulations.

Section 13 of the Bill is designed to enable Scottish Ministers to ensure that all managers follow these arrangements in future when management has been devolved. This would allow rents to continue to be set on the same technical basis, but also to recognise that, over time, the formula may have to change. Currently, the formula for aquaculture relates to the price of 4-5kg fresh Atlantic Salmon on the French Rungis market – Fin Fish Review January 2017 [58e4d2b3859cd_CES-report-2017-finfish.pdf](#).

As the rents and formula for leasing of Scottish Crown Estate assets are not currently set by legislation and are based on technical and operational factors the Scottish Ministers regard it as appropriate to continue this approach and that it is not necessary for this to be done legislatively in the future. Similar considerations apply for other licences and charges in respect of Scottish Crown Estate assets.

Section 36 – Ministerial guidance

9. The Committee noted that, in relation to the power to issue guidance in section 36, an explanation of this power should have been included in the DPM.

The Committee now asks for an explanation of this power.

The Scottish Ministers do not consider that section 36 has the effect of delegating a power and so did not consider it necessary to refer to section 36 in the Delegated Powers Memorandum.

The Scottish Ministers have an inherent power to issue guidance. Rather than confer a power on the Scottish Ministers, or any other person, section 36 has the effect of imposing duties on managers and on the Scottish Ministers. Those duties are that managers must have regard to any written guidance given by the Scottish Ministers about the exercise of the management function, and that the Scottish Ministers must publish any such guidance after it is given.

An example of the subject matter of guidance that the Scottish Ministers may choose to provide to managers is guidance on the duty under section 11(1) to obtain market value for the transfer of ownership etc. of a Scottish Crown Estate asset and the discretion to depart from that duty under subsection (2) of that section, which also requires managers to have regard to the likely effect of such a departure on the overall value of the Estate as required under subsection (3) of that section.

Yours sincerely

Catriona Graham